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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

## No. 126

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
*Petitioners,*

v.

UNITED STATES OF AMERICA

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

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### I. SINCE THE PRESENT CASE AT EVERY LEVEL PROCEEDED ON THE CONCESSION MADE BY THE UNITED STATES ATTORNEY AT THE HEARING ON THE MOTION TO SUPPRESS, "THAT FOR THE PURPOSES OF THIS MATTER WE MAY TREAT [THE STATE SEIZURE] AS ILLEGAL," THE PROSECUTION CANNOT NOW BE HEARD TO ARGUE THE CONTRARY

After Chief Herder had made it clear that he did not know the petitioner Clark (R. 72, 78), did not know where Clark lived (R. 75), had no personal knowledge of any obscene photographs or sound recordings at Clark's residence (R. 77) or of any other matters concerning Clark (R. 72, 73-74, 78), the trial judge asked the United States

Attorney for the prosecution's position as to the legality of the State seizure (R. 79). The United States Attorney said that he considered the matter immaterial (R. 79-80). Then followed this question and answer (R. 80):

> "The Court: Well, I was just wondering how far we should go into this matter of the State seizure.
>
> "Mr. Luckey: I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that *for the purposes of this matter we may treat it as illegal.*"

In view of the last clause quoted—which we have italicized—it must be apparent that the prosecution's present assertion (U.S. Br. 30), that "the government, during petitioners' federal trial, neither claimed that the search and seizure was valid nor admitted its invalidity," is quite devoid of record support.

Similarly, the prosecution's further assertions (U.S. Br. 27) that the Federal district court "did not undertake to decide one way or another whether the state warrant was valid under state or federal law," and that (U.S. Br. 30) "the federal district court did not determine this issue," are palpably misleading: After the United States Attorney's concession there was nothing more as to this issue remaining to be litigated or determined.*

At no point in the trial which followed the denial of petitioners' motion to suppress did the United States Attorney ever withdraw his concession as to the illegality of the State seizure. At no point in his 59-page brief in the Court of Appeals did the United States Attorney either withdraw that concession or undertake to argue that the State seizure was legal.

Petitioners relied on the concession in seeking certiorari (Pet. 17, 22), and only argued the matter in terms of illegality as a matter of Federal law (Pet. 22). And the

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* During the trial, the Federal District Judge said (R. 313) that both State courts properly held the search illegal as a matter of Oregon law.

Government's memorandum in non-opposition to the petition for certiorari did not suggest in any way that the United States Attorney's concession of the illegality of the State seizure would be repudiated.

We submit, therefore, that it is not open to the prosecution at this juncture, after the record has been fixed, after the case has reached the third court, to withdraw the solemn concession made by its authorized representative at the trial. The doctrine of judicial admissions forbids. *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263-264; 9 Wigmore, *Evidence* (3rd ed. 1940) §§ 2588, 2590, 2591.

Of course, withdrawal of the concession made at the trial might avoid decision on the continued validity of the "silver platter" doctrine. But that issue was in the present case from the outset. The district court relied on the doctrine in denying the motion to suppress (R. 278-286), and the United States Attorney relied on it in his brief on appeal (Appellee's Br., No. 15378, C.A. 9, pp. 19-27), dismissing (*id.*, p. 21) petitioners' argument based on *Hanna* v. *United States*, 260 F. 2d 723 (D. C. Cir.) with the remark that "The *Hanna* case reaches its conclusion by speculating on possible future action of the Supreme Court."

There has therefore been no such change in circumstances as would justify the prosecution in now withdrawing its concession—except, no doubt, the circumstance that further speculation on the action of this Court may well have induced a newly-generated reluctance to allow the "silver platter" doctrine to be reexamined.

We submit that orderly judicial administration precludes success for the prosecution's present attempt to withdraw the United States Attorney's considered admission (R. 80) "that for the purposes of this matter we may treat it"—the State seizure—"as illegal."

## II. IF HOWEVER THE LEGALITY OF THE STATE SEIZURE IS STILL OPEN, THEN THIS RECORD MAKES PERFECTLY CLEAR THAT IT WAS ILLEGAL BY FEDERAL STANDARDS.

### A. State officers who break into a dwelling house under color of a search warrant based on multiple hearsay violate the Due Process clause of the Fourteenth Amendment.

#### (i) The State search warrant was based on multiple hearsay.

We set out below the facts as to the knowledge underlying the affidavit on which the State search warrant was issued, and do so in some detail, inasmuch as those facts are only selectively and partially, and hence quite misleadingly, stated in the prosecution's brief.

*First.* The affidavit underlying the State search warrant (R. 20-21) was executed "upon information and belief" (R. 20) by District Attorney Langley, who added (R. 21), "I further depose and say that the source of my information is Chief of Police Herder of St. Helens, Oregon." Accordingly, neither Langley (R. 55-56) nor the prosecution (U. S. Br. 6, 31) is now free to alter that document by contending that other but unnamed individuals also gave him the same information.

*Second.* Chief Herder testified that he did not know the petitioner Clark (R. 72, 78), that he did not know where Clark lived (R. 75), that he had no personal knowledge of any obscene photographs or sound recordings at Clark's residence (R. 77), and that he had no knowledge of any other matters concerning Clark (R. 72, 73-74, 78). This testimony was consistent with Chief Herder's earlier testimony at the hearing in the State District Court on the motion to suppress, when he had said that he did not know Clark (Def. Ex. 21, pp. 15, 16; not printed), that he did not know where Clark lived (*id.*, p. 16), and that while he had heard of Clark, he did not know him (*id.*, p. 17).

Moreover, as Chief Herder himself testified, all of his information was hearsay (R. 72, 73, 77, 78-79), and it was so stated by him to the newspaper reporter, Brad Williams (R. 73, 74, 79). The sources of some of Chief Herder's

information were Deputy Sheriffs Evans and Younce of Columbia County (R. 73, 74), who of course were not in any sense his subordinates, St. Helens being merely one municipality in that County.

Yet, in the face of this record, the prosecution undertakes to tell this Court (U. S. Br. 40) that "Police Chief Herder was in a particularly good position to know of petitioner Clark's activities"!

*Third*, Chief Herder was positive that he never talked to Langley (R. 72, 77; Def. Ex. 21, p. 15; not printed), whom he did know (R. 72). Chief Herder also located his telephone call to Williams, in which hearsay information as to alleged obscene recordings in Clark's possession was passed on, as having taken place during an evening (R. 72, 73, 75-76), probably on Friday, May 11, 1956 (R. 75). Chief Herder fixed the time of day with considerable circumstantial particularity (R. 72-75), and was positive that he did not talk to Williams around 3:30 P.M. on Thursday, May 17 (R. 78).

Langley, however, says that he listened in on the Herder-Williams conversation in his own office on Thursday afternoon, May 17 (R. 57-59), and his testimony regarding what Herder said (R. 55-56) was based on that listening-in, of which Chief Herder was unaware (R. 74).

We suggest that Langley never listened in on any conversation, and that he was simply told by Williams what Herder had said, no doubt without any qualification as to hearsay.

(1) Herder talked to Williams when the latter was at his newspaper office; Herder was sure of this because that was where he called Williams back (R. 75-76). A country Chief of Police would be more impressed by, and hence more likely to remember the time of, a long-distance telephone call, than the District Attorney in a large city. Herder therefore did not in fact make the call to Williams which Langley claims to have overheard.

(2) It strains credulity to suppose that a District Attorney in a city as large as Portland would fail to telephone the Chief of Police in a neighboring community directly if he wanted information, and would instead, unbeknownst to the source of his information, simply listen in on a reporter's call to such Police Chief. That is not the way prosecutors communicate with law enforcement officers.

(3) Herder was disinterested, with nothing at stake; Langley's official conduct was in issue. Indeed, shortly after testifying on the motion to suppress, Langley was indicted by the State Grand Jury (of Multnomah County) for conspiracy, some of the overt acts of which involved the very search warrant here in issue (Def. Ex. 46, not printed; see Overt Acts 2, 3, and 4).

(4) The prosecution complains that Langley was not permitted to testify when the motion to suppress was heard in the State District Court (U. S. Br. 9, 38 note 13). But the record of that hearing shows that despite the thrice repeated request of the State District Judge that Langley be present (Def. Ex. 21, pp. 8, 13, 21; not printed), the latter did not appear; instead, in the interval between the first and second sessions of that hearing (*id.*, pp. 21, 22, 26), Langley went before the State Grand Jury and had both petitioners indicted (*id.*, p. 26; R. 68) on the basis of the very evidence which was sought to be suppressed in the period proceeding. Langley can therefore hardly complain that he was denied a hearing at a proceeding that he so assiduously avoided attending.

In any event, since Langley deposed in his affidavit (R. 21) that "the source of my information is Chief of Police Herder of St. Helens, Oregon," and since Herder's testimony was (Def. Ex. 21, pp. 15-17; not printed) that he had no personal knowledge of Clark or his activities, there was nothing left to investigate. As Judge Mears said (R. 412), "You can't change this document." If Langley had there

testified as he later did in the present proceeding (R. 55-56), that he understood Chief Herder differently, he would not have enhanced either his affidavit or the warrant which it supported: When an informant lacks personal knowledge, the affiant's misunderstanding of the informant does not transform the latter's hearsay into actual knowledge.

*Fourth.* If, as we believe, Langley got his information from Williams, who in turn got his from Chief Herder, who in turn obtained his information from others, then the State search warrant (R. 404-405) was issued on an affidavit based on treble hearsay.

If, however, Langley's story of listening in on the extension phone is to be credited, then, regardless of what Langley may have thought he heard, or later said that he heard, it is still the fact that the sworn source of his information (R. 21), Chief Herder, had no personal knowledge of the matters set forth in the Langley affidavit (R. 20-21). This means that the State search warrant was based, not on triple, but only on double hearsay.

**(ii) Multiple hearsay does not constitute probable cause sufficient to search a dwelling house**

The prosecution argues (U. S. Br. 32) that "Langley's information was set forth in an affidavit and a state search warrant was obtained. Thus, far from constituting himself the sole judge of whether probable cause existed to make a search, Langley fully and fairly set forth the source and nature of his information and invoked proper state procedures in obtaining state process. The Langley affidavit would thus have been adequate to constitute probable cause for the issuance of a federal search warrant under the Fourth Amendment."

This argument conveniently ignores the fact that the very judge who issued the warrant stated that he would never have done so if Langley had revealed the true facts (R. 411-412, quoted at Pet. Br. 7).

Passing that point, we submit that where, as here, the affiant relies on information obtained from another who himself lacks personal knowledge, such double hearsay does not add up to probable cause, least of all where the search of a dwelling house is involved.

No case in this Court remotely sanctions reliance upon double hearsay even when less than the search of a dwelling house is involved.

In *Draper* v. *United States*, 358 U. S. 307, matter that was hearsay to the arresting officer, Marsh, was not hearsay to his informant.

In *Brinegar* v. *United States*, 338 U. S. 160, 172, "There was hearsay, but there was much more."

In *Carroll* v. *United States*, 267 U. S. 132, "the facts within the officers' knowledge when they intercepted the Carroll defendants amounted to more than mere suspicion and constituted probable cause for their action." *Brinegar*, 338 U. S. at 177.

*Draper* involved arrest, *Brinegar* and *Carroll* the stopping of automobiles; none of those cases dealt with the search of a dwelling house. So far as the search of a dwelling house is concerned, this Court has squarely held that "a mere affirmation of suspicion and belief without any statement of adequate supporting facts" is insufficient, because in violation of the Fourth Amendment. *Nathanson* v. *United States*, 290 U. S. 41.

Since Langley had only information and belief, since his informant had no information that rose above hearsay, and since Langley's affidavit was similarly barren of "any statement of adequate supporting facts," we think it too plain for argument that he did not show probable cause for the issuance of a Federal search warrant under the Fourth Amendment, and that, by parity of reasoning, he failed to show probable cause for the issuance of a State

search warrant under the Fourteenth. The United States Attorney's trial concession as to the illegality of the original State seizure (R. 80) was therefore well founded.

Indeed, Langley did not establish probable cause sufficient even for the stopping of an automobile. See *Henry* v. *United States*, 361 U. S. 98, a case which the prosecution very pointedly omits to cite, although it was decided only a few months ago.

**B. Since the State officers were acting under an invalid search warrant, they were not lawfully inside the petitioner Clark's house, and therefore had no authority to seize anything not contraband.**

The prosecution argues (U. S. Br. 33) that "This Court has frequently held that an officer who has *lawfully* entered the premises, may seize both the 'instrumentality and means by which a crime is committed' and 'the fruits of crime.'" We have added the italics, because here the State officers who broke into the petitioner Clark's dwelling house were not lawfully on the premises: They entered pursuant to a warrant that was fatally defective because the affidavit on which that warrant was based did not establish probable cause. *Nathanson* v. *United States*, 290 U. S. 41. The prosecution's authorities are therefore inapplicable.

**C. Even if it be assumed for purposes of argument that the State officers were lawfully within the house, they still lacked information entitling them to seize the tapes.**

But even on the assumption—the very violent assumption—that the State officers were lawfully in Clark's residence, they were still not entitled to seize the tapes in question because the officers had no information that would lead them to believe that those tapes were (*Harris* v. *United States*, 331 U. S. 145, 154) "the instrumentalities and means by which a crime is committed."

Minielly, who found the tapes in the hassock after a reporter pointed to that piece of furniture (R. 249), admitted that he was unable to tell what the tapes contained (R. 247, 250) or whether they contained intercepted telephone conversations (R. 248), and admitted that there was no evidence to show that any of the many articles he seized (R. 407-408) were being used in the commission of any crime (R. 259-260).

The prosecution concedes (U. S. Br. 33) that Minielly was unable to determine the nature of the tapes' contents, because he did not know how to operate a tape recorder (R. 253). But it argues (U. S. Br. 7, 33) that, on the basis of the notes found in the boxes, Minielly was justified in concluding that the tapes were recordings of telephone communications, and therefore were property used to violate the law.

Now, very plainly, the laws against wire-tapping were violated only if (a) there was an interception *and* (b) such interception took place without the consent of the sender.

Visual inspection of the tapes would obviously reveal neither of these elements. But it is contended by the prosecution that Minielly obtained information as to the tapes' contents from (R. 248) "pieces of paper like note paper with a synopsis of what was contained on each tape, the names of individuals," and that these slips, plus what Minielly learned from newspaper reports (R. 248), led him to conclude that telephone conversations were recorded.

The difficulty with this theory is that it lacks record support. Minielly's testimony on the hearing of the motion to dismiss was given on April 12, 1957 (2 MS 396). Eleven months earlier, when testifying before the State District Court on the motion to suppress, Minielly said (Def. Ex. 21, p. 76; not printed) that

> "I just glanced at the notes. I didn't go to the trouble to read them."

Moreover, while Minielly arrested the petitioner Clark and Mrs. Martin for possessing slot machines, he did not arrest either of them for wire-tapping (*id.*, p. 85):

> "Q. You didn't arrest them for wire tapping then, did you?
> "A. No sir."

We might add that Minielly did not undertake to arrest Clark for possessing obscene and indecent photographs with accompanying sound recordings; Minielly's return on the search warrant (R. 406) shows that he found no matter of that description on the premises.

It is therefore not possible to sustain the prosecution's present belated claim that Minielly was aware of what the tapes contained when he seized them, much less that he then had the slightest intimation that these tapes might be instrumentalities or fruits of crime.*

The record accordingly shows that the raid on petitioner Clark's house was a general exploratory search for evidence of crime, precisely like those condemned in *Go-Bart Co.* v. *United States*, 282 U. S. 344, and in *United States* v. *Lefkowitz*, 285 U. S. 452. It was therefore an unreasonable search that violated the Due Process clause of the Fourteenth Amendment. *Wolf* v. *Colorado*, 338 U. S. 25.

## III. IF THE LEGALITY OF THE STATE SEIZURE IS STILL OPEN, THEN THE PRESENT RECORD SIMILARLY MAKES PERFECTLY CLEAR THAT IT WAS ILLEGAL BY STATE STANDARDS ALSO.

As petitioners have several times indicated (Pet. Br. 45, 50, 70), the Federal District Court would have been entitled to reexamine the legality of the State seizure, a

* If petitioners had had any inkling that the prosecution would seek in this Court to repudiate the United States Attorney's concession regarding the illegality of the original seizure (R. 80), they would assuredly have designated for printing much more of the State District Court hearing, Def. Ex. 21, than they did (R. 410-414).

course which became unnecessary when the United States Attorney conceded that the State seizure was illegal (R. 80). Petitioners have never controverted the prosecution's argument (U. S. Br. 37) that the State Circuit Court's decision would not be binding on the Federal court in determining whether the evidence was illegally obtained.

What is primarily important here is that the State search and seizure was illegal under the Fourteenth Amendment. Its illegality under State law is only material because, by using the fruits of an illegal State seizure, the United States is relying on a violation of State law to redress a violation of Federal law. We have already demonstrated the impropriety of such use; see Pet. Br. 54-59, and especially Brandeis, J., in *Olmstead* v. *United States*, 277 U. S. 438, 479-485.

**A. No Oregon decision holds that a search warrant for entry into a dwelling house may issue on multiple hearsay.**

The prosecution now seeks to argue (U. S. Br. 38-40) that, in the case of *State* v. *Hoover*, 347 P. 2d 69, the Supreme Court of Oregon held (U. S. Br. 38) that "information received from an identified, reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant."

If anyone will trouble to read the cited opinion in the light of the facts there involved, he will readily find that *Hoover* held no such thing. That case did not concern a search warrant. The question there presented was whether, when a police officer had been informed that the driver of an automobile was carrying a gun, and was so informed by an individual at whom that driver had pointed the gun, the police officer was justified in arresting the driver and in searching his automobile. It will not come as a surprise that the search in those circumstances was held legal; after all, the police officer's informant was speaking from personal knowledge. Compare *Brinegar* v. *United States*, 338

U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Henry* v. *United States*, 361 U. S. 98.

*Hoover* involved a search of an automobile incident to an arrest. No dwelling house was even remotely involved. No search warrant was sought, in respect of which the Oregon Constitution's requirement in its Article I, Section 9 (Pet. Br. 105) is identical with that of the Fourth Amendment. And the officer's informant in *Hoover*, unlike the informant on whom Langley relied here (R. 21), had personal knowledge of the facts.

It cannot therefore be supposed that the Supreme Court of Oregon was undertaking to overrule *sub silentio* its repeated holdings that an affidavit on information and belief did not supply the probable cause which the Oregon Constitution prescribes as the prerequisite for the issuance of a search warrant. *State* v. *Quartier*, 114 Ore. 657, 236 Pac. 746, and other cases cited at Pet. Br. 38. Indeed, we submit that Oregon could not constitutionally sanction police entries into private residences merely on the basis of hearsay. *Wolf* v. *Colorado*, 338 U. S. at 28, quoted at Pet. Br. 43.

Any contention to the contrary is the most wishful kind of wishful thinking—although of course it does underscore the lengths to which the prosecution feels impelled to go to avoid reexamination of the "silver platter" doctrine.

It should also be noted that, under Oregon law, the right of an officer to seize articles not named in the warrant is limited to "property that he discovers by his own senses is being then and there used as an instrumentality in the commission of a crime." *State* v. *Muetzel*, 121 Ore. 561, 565, 254 Pac. 1010, 1011—a case inaccurately, because far too broadly, stated at U. S. Br. 40. Minielly's testimony plainly showed that the tapes he seized were not being "then and there used as an instrumentality in the commission of a crime" (R. 247-250).

**B. In any event, no subsequent decision can affect the fact that two Oregon courts suppressed the evidence now in question in proceedings terminated more than three years earlier.**

But, even if *State* v. *Hoover*, 347 P. 2d 69, decided in November 1959, is susceptible of a broader interpretation, it cannot alter the fact that, in May and again in September 1956, two Oregon courts suppressed the evidence here in question because of the illegality of the State search and seizure (R. 21-24, 411-413; 25-28). Moreover, the record shows that "the said Attorney General [of Oregon] has advised the District Attorney of Multnomah County in writing that the said evidence was illegally seized by State officers." The foregoing quotation is from a document filed in the State Circuit Court on September 25, 1956, after the latter's order suppressing the evidence, and signed by Howard Lonergan on behalf of his superior, District Attorney Langley. Def. Ex. 13; not printed.

So far as the present proceeding is concerned, therefore, the illegality of the State seizure must be taken as established, nor would that illegality be affected by a subsequent change in the law, even if it could be assumed that such a change had ever actually occurred. For when rights and liabilities have once become settled by judgments no longer subject to appeal, later modifications in the law, whether by judicial decision or otherwise, do not unsettle what has already been finally adjudicated.

Thus, a decisional change, through overruling or qualification, does not result in release for prisoners whose convictions had become final while the earlier decisions were still deemed binding. *Sunal* v. *Large*, 332 U. S. 174; *Warring* v. *Colpoys*, 122 F. 2d 642 (App. D. C.), certiorari denied, 314 U. S. 678. Similarly, the repeal of the Eighteenth Amendment did not entitle violators of the National Prohibition Act whose convictions had become final to leave their prisons. *Hosier* v. *Aderhold*, 71 F. 2d 422 (C. A. 5); *United States ex rel. Nerbonne* v. *Hill*, 70 F. 2d 1006 (C. A. 3); cf. *United States* v. *Chambers*, 291 U. S. 217 (*aliter* where judgment not final).

Nor is it correct to urge (U. S. Br. 37) that the orders of suppression were not reviewable. The record shows that the State District Court's order of suppression (R. 21-24) was reargued in the State Circuit Court (R. 25-28). And *State* v. *DeFord*, 120 Ore. 444, 250 Pac. 220, represents an instance of the prosecution being able to review an order suppressing evidence. See also O.R.S. 34.010 (writ of review).

Here the State Circuit Court's order of suppression (R. 25-28) was not appealed, not because it was unreviewable, but because the District Attorney preferred to let the Federal prosecution proceed since, as noted, he had been advised by the State Attorney General that the State seizure was illegal. Def. Ex. 13, not printed, quoted in part at Pet. Br. 11, note 3.

**C. Langley's tardy motion to reopen the State Restraining Order is without legal significance.**

The extent to which the prosecution is prepared to go to avoid arguing the "silver platter" doctrine on the merits is further emphasized by its reliance (U. S. Br. 29) on a belated motion, filed by Langley on February 29, 1960, seeking to vacate the State Circuit Court's orders of April and May 1957 which restrained the State and County witnesses from testifying (R. 301-304). We set forth in an Appendix the text of this motion, which will be heard on March 31, 1960.*

Langley's desperation is understandable. He has been removed as District Attorney for misconduct in office. *State* v. *Langley*, 214 Ore. 445, 315 P. 2d 560, 323 P. 2d 301, certiorari denied, 358 U. S. 826 (No. 193, Oct. T. 1958). He is moreover the subject of pending disbarment proceedings. See *In re Langley's Conduct*, 341 P. 2d 538. While his motion seems plainly devoid of merit, it would

* Judge Redding said in open court on March 23 that in his opinion nothing in the *Hoover* case (in which he sat as a member of the Supreme Court) minimized the illegality of the State seizure in the present case.

be unfair in the circumstances to criticize him for grasping at straws.

But why does the prosecution here feel it necessary to rely on such a weak reed for the proposition (U. S. Br. 29) that *State* v. *Hoover*, 347 P. 2d 69, which dealt with the search of an automobile incident to an arrest, on information known to the informant, may somehow, sometime, lead to a holding that, contrary to the plain intent and language of the Oregon Constitution, a warrant to search a dwelling house may issue on an affidavit which rests on multiple hearsay?

## IV. THE FEDERAL SEARCH WARRANT CANNOT BE SUSTAINED ON APPEAL ON A FACTUAL BASIS THAT THE TRIER OF FACTS REFUSED TO CONSIDER.

Petitioners' position as to the Federal search warrant (Pet. Br. 91-103) is briefly that, while there is enough in the record to show its invalidity, the Court of Appeals was not free to hold that document valid after the District Court had cut off proof. Otherwise stated, an appellate court may not sustain a conviction on appeal on a factual ground not passed on by the trier of facts. *Grunewald* v. *United States*, 353 U. S. 391.

At R. 201, the District Judge said that in his view it made no difference whether the Federal search warrant was valid or not; and when counsel asked what that ruling "would prevent me from attempting," the judge replied (R. 201),

> "Well, for the instant it would prevent you from further inquiring as to the basis of knowledge—the basis for Mr. Sherk's knowledge or lack of knowledge in executing the affidavit for the search warrant. This Court doesn't care from here on out whether he ever executed an affidavit for a search warrant.
>
> . . . . . .
>
> "From here on out the Court will not concern itself with whether or not there was ever a search warrant issued upon an affidavit by Mr. Sherk."

The prosecution now argues that because the judge immediately afterwards told counsel (R. 201) that "You may make your record," "To protect your theory about it", this meant (U. S. Br. 43) "that defense counsel was entitled to inquire fully as to the sources of Sherk's knowledge."

It must be obvious that this argument was not formulated by anyone who had ever tried a case in a United States District Court. When a United States District Judge tells counsel he may not inquire further but may make his record to protect his theory, that is certainly not an invitation to persist in repeating the excluded questions. Indeed, the colloquy on R. 202, immediately following, shows that the ruling was not understood by any of the participants in the trial in the sense that the prosecution now formulates.

We note that, in its discussion of the Federal search warrant (U. S. Br. 41-45), the prosecution does not reply to our contention (Pet. Br. 101-103) that this instrument was invalid because directed at property in the constructive custody of a State court.

Silence at times may well have virtue, but in this instance it fails to indicate whether the prosecution agree with us, or whether they simply consider our proposition too thorny to be firmly grasped.

## V. EVIDENCE OBTAINED IN VIOLATION OF THE FOURTEENTH AMENDMENT IS INADMISSIBLE IN A FEDERAL PROSECUTION REGARDLESS OF THE DEGREE OR ENORMITY OF THE VIOLATION.

The prosecution argues (U. S. Br. 67-71) that, "If the 'silver platter' doctrine is rejected, this Court could consider the seriousness of the impropriety in deciding whether to exclude evidence illegally obtained."

That suggestion, all too plainly, boils down to a contention that, so long as there is present only a little unconstitutionality, a conviction based on illegally seized evidence should none the less be sustained.

We have no doubt that the Court will reject this all too obviously last-ditch alternative. A search is either valid or invalid; there is no middle ground. Close cases will of course arise in the future, as indeed they have in the past; but however difficult it may be to draw the line, a line must somewhere be drawn. An illegal search can no more be saved from condemnation by the apologetic comment that it is only slightly unconstitutional than an egg can be classed as edible simply because it is only slightly rotten.

The prosecution argues (U. S. Br. 68) that "evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights."

Even under that attenuated standard, it is plain that the present search cannot be saved. For this record shows all too plainly that the State officers did not act in good faith.

1. Langley was out to get the petitioner Elkins, and had it in mind to send him to the penitentiary for life on the strength of a traffic charge. See Langley's testimony (9 Tr. 1517, 10 Tr. 1671) quoted at Pet. Br. 49, note 2.

2. Langley was less than candid with the State District Judge to whom he applied for a search warrant (R. 411-412, quoted at Pet. Br. 7).

3. Langley caused the search warrant to be executed and served between 8:30 and 11:30 P. M. of a night (R. 406, 408) that was followed by three non-judicial days (Pet. Br. 7). Otherwise stated, no judicial redress for the illegal Thursday night search could be had until Monday morning.

4. The State officers copied the tapes during that interval and facilitated publication of their contents in a newspaper (Pet. Br. 6, 8).

5. Langley used the tapes to obtain petitioners' indictment by the State Grand Jury at the very time that a motion to suppress those very tapes was *sub judice* in the State District Court (Pet. Br. 8; R. 26, 68; Def. Ex. 21, pp. 21, 22, 26, not printed).

It is therefore sheer mockery for the prosecution to speak (U. S. Br. 68) of "state officers acting in good faith but mistakenly failing to comply with all the legal requirements."

Petitioners are not alone in questioning the motives of the State officers concerned. Langley was indicted for the excesses growing out of the defective warrant (Def. Ex. 46, not printed); he has since been judicially removed from office because of misconduct (*State* v. *Langley*, 214 Ore. 445, 315 P. 2d 560, 323 P. 2d 391, certiorari denied, 358 U. S. 826); and he is the subject of pending disbarment proceedings (*supra*, p. 15). It is true that after his removal from office the pending indictment was dismissed at the instance of the prosecution, but certainly that *nolle prosequi* did not amount to an affirmation of Langley's good faith in May 1956.

Nor is it possible to urge that the evidence here in question was not (U. S. Br. 68) "obtained by intentional or clear violation of constitutional rights."

Forcible breaking into a dwelling house in the night-time (R. 240, 406) can hardly be classed as an inadvertent or as a merely negligent act. And if there can be a clearer violation of constitutional rights than the issuance of a search warrant for entry into a private residence on an affidavit which is based on treble or—at the most charitable—double hearsay, it has not yet been disclosed.

The remaining issues under the "silver platter" doctrine do not require further argument.*

## VI. THE SUPREMACY CLAUSE CANNOT PROPERLY BE INVOKED TO FURTHER A VIOLATION OF THE FOURTEENTH AMENDMENT.

Petitioners argued (Pet. Br. 74-91) that the rule of *Rea v. United States*, 350 U. S. 214, was one of comity, justifying the State Circuit Court in enjoining State officials from testifying as to the circumstances of a State search and seizure that two State courts had successively held illegal. The prosecution, arguing to the contrary (U. S. Br. 71-84), invokes the Supremacy Clause.

There is no need to repeat or restate petitioners' views on that issue here; they have already been fully presented. It is sufficient to add that, if the *Rea* question is reached, and if it is decided on the basis of the prosecution's arguments, then the Supremacy Clause will have been employed, not to establish the national paramountcy of "This Constitution," but rather to insure that courts of the United States shall accord to violations of the Fourteenth Amendment an approbation that does not inure to violations of the Fourth.

Otherwise stated, the prosecution is now in the position of invoking the Supremacy Clause in an effort to redress the violation of a Federal statute with the fruits of a demonstrable violation of the Federal Constitution.

* It is not however accurate for the prosecution (U. S. Br. 60) to characterize petitioners' contentions based on the possibility of subterfuge and evasion (Pet. Br. 72-74) as their "principal arguments" in favor of excluding the present evidence. Our principal argument under "silver platter" is the one we placed first, and advisedly placed first, viz., that "The assumption underlying the 'silver platter' doctrine has since been rejected by this Court" (Pet. Br. 52-54).

## CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that the judgments below should be reversed, and the case remanded to the United States District Court for the District of Oregon, with directions to grant petitioners' motion to suppress.

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MARCH 1960.

[See overleaf for Appendix.]

## APPENDIX

### Langley's 1960 Motion to Vacate 1957 Orders

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 238-958

JAMES BUTLER ELKINS and RAYMOND FREDERICK CLARK,
*Plaintiffs,*

vs.

GEORGE MINTELLY, TERRY SCHRUNK, WILLIAM M. LANGLEY, *et al.*,
*Defendants.*

MOTION

Comes now William M. Langley and moves this Court to vacate the Orders of the within Court dated April 15, 1957 and May 21, 1957, and in support of this motion states:

That the Sheriff of Multnomah County, Oregon, conducted on May 17, 1957, a search of the home of Raymond Frederick Clark pursuant to a search warrant issued by a magistrate of Multnomah County, Oregon. A copy of the affidavit for the search warrant is attached hereto marked exhibit A.

That the said Orders were based upon a decision, to-wit: "that the search warrant was improperly obtained on a faulty affidavit in that the Honorable William M. Langley, District Attorney for Multnomah County, who applied therefor, did not have personal knowledge of the facts set forth in his affidavit", by the within Court.

That after the above decision by the within Court, the Oregon Supreme Court, the highest Court in Oregon, on November 25, 1959, in *State of Oregon* vs. *Hoover*, held that there is no constitutional barrier to a search based upon information alone; and that probable cause exists when the information is from a reasonably trustworthy source.

That the information contained in exhibit A was from a reasonably trustworthy source, to-wit: Chief of Police Herder of St. Helens, Oregon.

POINTS AND AUTHORITIES

The question is one of probable cause.

Probable cause is established by information from a trustworthy source. *State* vs. *Hoover*, 347 P. 2d. 69; decided by Oregon Supreme Court, November 25, 1959. *Pucaro* vs. *McKonnell*, 198 NYS (New York Supp.) 719—cited with approval in *State* vs. *Hoover*.

/s/ WILLIAM M. LANGLEY.

[Certificate of Service omitted]

# SUPREME COURT OF THE UNITED STATES

No. 126.—October Term, 1959.

James Butler Elkins and Raymond Frederick Clark, Petitioners,
*v.*
United States of America.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were indicted in the United States District Court in Oregon for the offense of intercepting and divulging telephone communications and of conspiracy to do so. 47 U. S. C. §§ 501, 605; 18 U. S. C. § 371. Before trial the petitioners made a motion to suppress as evidence several tape and wire recordings and a recording machine, which had originally been seized by state law enforcement officers in the home of petitioner Clark under circumstances which, two Oregon courts had found, had rendered the search and seizure unlawful.[1]

[1] The state officers, having received information that petitioners had in their possession obscene motion pictures, procured a search warrant to search petitioner Clark's home. The affidavit upon which the warrant was based recited that "upon information and belief" it was thought that Clark possessed obscene pictures and accompanying sound recordings. The search revealed no obscene pictures, but various paraphernalia believed to have been used in making wiretaps were found and seized.

Following an appropriate motion, the Multnomah County District Court held the search warrant invalid and ordered suppression of the evidence. This action came, however, after the return of an indictment by a state grand jury, and the local district attorney challenged the power of the district court to suppress evidence once an indictment was in. Accordingly, the question was later argued anew on a motion to suppress in the Circuit Court for Multnomah

At the hearing on the motion the district judge assumed without deciding that the articles had been obtained as the result of an unreasonable search and seizure, but denied the motion to suppress because there was no evidence that any "agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper." At the trial the articles in question were admitted in evidence against the petitioners, and they were convicted.

The convictions were affirmed by the Court of Appeals for the Ninth Circuit, 266 F. 2d 588. That court agreed with the district judge that it was unnecessary to determine whether or not the original state search and seizure had been lawful, because there had been no participation by federal officers. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized." 266 F. 2d, at 594.

We granted certiorari, 361 U. S. 810, to consider a question of importance in the administration of federal justice. The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced in evidence against a defendant over his timely objection in a federal criminal trial? In a word, we

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County, a court of general criminal jurisdiction. That court held the search unlawful and granted the motion to suppress. The state indictment was subsequently dismissed.

During the course of these state proceedings federal officers, acting under a federal search warrant, obtained the articles from the safe deposit box of a local bank where the state officials had placed them. Shortly after the state case was abandoned, a federal indictment was returned, and the instant prosecution followed.

re-examine here the validity of what has come to be called the silver platter doctrine.[2] For the reasons that follow we conclude that this doctrine can no longer be accepted.

To put the issue in historic perspective, the appropriate starting point must be *Weeks* v. *United States*, 232 U. S. 383, decided in 1914. It was there that the Court established the rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights. The foundation for that decision was set out in forthright words:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

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[2] The "silver platter" label stems from a phrase first turned in the prevailing opinion in *Lustig* v. *United States*, 338 U. S. 74, 79. The doctrine has been the subject of much comment in legal periodicals. See, *e. g.*, Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 14–25; Galler, The Exclusion of Illegal State Evidence in Federal Courts, 49 J. Crim. L. C. & P. S. 455; Kohn, Admissibility in Federal Court of Evidence Illegally Seized by State Officers, 3 Wash. U. L. Q. 229; Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083; Parsons, State-Federal Crossfire in Search and Seizure and Self Incrimination, 42 Cornell L. Q. 346, 347–368; Comment, The *Benanti* Case: State Wiretap Evidence and the Federal Exclusionary Rule, 57 Col. L. Rev. 1159; Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144; Notes, 51 Col. L. Rev. 128, 27 Geo. Wash. L. Rev. 392, 5 N. Y. L. F. 301, 6 U. C. L. A. Rev. 703.

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
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> ". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U. S. 383, 391–393.

To the exclusionary rule of *Weeks* v. *United States* there has been unquestioning adherence for now almost half a century. See *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20; *Go-Bart Co.* v. *United States*, 282 U. S. 344; *Grau* v. *United States*, 287 U. S. 124; *McDonald* v. *United States*, 335 U. S. 451; *United States* v. *Jeffers*, 342 U. S. 48.

But the *Weeks* case also announced, unobtrusively but nonetheless definitely, another evidentiary rule. Some of the articles used as evidence against Weeks had been unlawfully seized by local police officers acting on their own account. The Court held that the admission of this evidence was not error for the reason that "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." 232 U. S., at 398. Despite the limited discussion of this second ruling in the *Weeks* opinion, the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years. See, *e. g.*, *Byars* v. *United States*, 273 U. S. 28, 33; *Feldman* v. *United States*, 322 U. S. 487, 492.[3]

That such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen. In any event the difficulties soon appeared. They arose from the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity. When in a federal criminal prosecution evidence which had been illegally seized by state officers was sought to be introduced, the question inevitably arose whether there had been such participation by federal

[3] See, *e. g.*, *Rettich* v. *United States*, 84 F. 2d 118 (C. A. 1st Cir.); *Milburne* v. *United States*, 77 F. 2d 310 (C. A. 2d Cir.); *Miller* v. *United States*, 50 F. 2d 505 (C. A. 3d Cir.); *Riggs* v. *United States*, 299 Fed. 273 (C. A. 4th Cir.); *Timonen* v. *United States*, 286 Fed. 935 (C. A. 6th Cir.); *Fowler* v. *United States*, 62 F. 2d 656 (C. A. 7th Cir.) (dictum); *Elam* v. *United States*, 7 F. 2d 887 (C. A. 8th Cir.); *Brown* v. *United States*, 12 F. 2d 926 (C. A. 9th Cir.); *Gilbert* v. *United States*, 163 F. 2d 325 (C. A. 10th Cir.); *Shelton* v. *United States*, 169 F. 2d 665 (C. A. D. C. Cir.), overruled by *Hanna* v. *United States*, 260 F. 2d 723.

agents in the search and seizure as to make applicable the exclusionary rule of *Weeks*. See *Flagg* v. *United States*, 233 Fed. 481, 483; *United States* v. *Slusser*, 270 Fed. 818, 820; *United States* v. *Falloco*, 277 Fed. 75, 82; *Legman* v. *United States*, 295 Fed. 474, 476–478; *Marron* v. *United States*, 8 F. 2d 251, 259; *United States* v. *Brown*, 8 F. 2d 630, 631.

This Court first came to grips with the problem in *Byars* v. *United States*, 273 U. S. 28. There it was held that when the participation of the federal agent in the search was "under color of his federal office" and the search "in substance and effect was a joint operation of the local and federal officers," then the evidence must be excluded, because "the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own." 273 U. S., at 33. In *Gambino* v. *United States*, 275 U. S. 310, the Court went further. There state officers had seized liquor from the defendants' automobile after an unlawful search in which no federal officers had participated. The liquor was admitted in evidence against the defendants in their subsequent federal trial for violation of the National Prohibition Act. This Court reversed the judgments of conviction, holding that the illegally seized evidence should have been excluded. Pointing out that there was "no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the [state] troopers believed that they had," the Court found that "the wrongful arrest, search and seizure were made solely on behalf of the United States." 275 U. S., at 314, 316.

Despite these decisions, or perhaps because of them, cases kept arising in which the federal courts were faced with determining whether there had been such participation by federal officers in a lawless state search as to make inadmissible in evidence that which had been seized.

And it is fair to say that in their approach to this recurring question, no less than in their disposition of concrete cases, the federal courts did not find themselves in complete harmony, nor even internally self-consistent.[4] No less difficulty was experienced by the courts in determining whether, even in the absence of actual participation by federal agents, the state officers' illegal search and seizure had nevertheless been made "solely on behalf of the United States."[5]

But difficult and unpredictable as may have been their application to concrete cases, the controlling principles seemed clear up to 1949. Evidence which had been seized by federal officers in violation of the Fourth Amendment could not be used in a federal criminal prosecution. Evidence which had been obtained by state agents in an unreasonable search and seizure was admissible, because, as *Weeks* had pointed out, the Fourth Amendment was not "directed to" the "misconduct of such officials." But if federal agents had participated in an unreasonable search and seizure by state officers, or if the state officers had acted solely on behalf of the United States, the evidence was not admissible in a federal prosecution.

Then came *Wolf* v. *Colorado*, 338 U. S. 25. With the ultimate determination in *Wolf*—that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents—we

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[4] Compare *Sutherland* v. *United States*, 92 F. 2d 305 (C. A. 4th Cir.); *Ward* v. *United States*, 96 F. 2d 189 (C. A. 5th Cir.); *Fowler* v. *United States*, 62 F. 2d 656 (C. A. 7th Cir.); *United States* v. *Butler*, 156 F. 2d 897 (C. A. 10th Cir.); with *Kitt* v. *United States*, 132 F. 2d 920 (C. A. 4th Cir.); *Sloane* v. *United States*, 47 F. 2d 889 (C. A. 10th Cir.).

[5] Compare *United States* v. *Jankowski*, 28 F. 2d 800 (C. A. 2d Cir.); *Marsh* v. *United States*, 29 F. 2d 172 (C. A. 2d Cir.); with *United States* v. *Butler*, 156 F. 2d 897 (C. A. 10th Cir.).

are not here directly concerned. But nothing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against arbitrary intrusion by the police . . . is implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. 25, 27. The Court has subsequently found frequent occasion to reiterate this statement from *Wolf*. See *Stefanelli* v. *Minard*, 342 U. S. 117, 119; *Irvine* v. *California*, 347 U. S. 128, 132; *Frank* v. *Maryland*, 359 U. S. 360, 362–363.

The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949. This removal of the doctrinal underpinning for the admissibility rule has apparently escaped the attention of most of the federal courts, which have continued to approve the admission of evidence illegally seized by state officers without so much as even discussing the impact of *Wolf*.[6] Only two of the courts of appeals which have adhered to the admissibility rule appear to have recognized that *Wolf* casts doubt upon its continuing validity. *Jones* v. *United States*, 217 F. 2d 381 (C. A. 8th Cir.); *United States* v. *Benanti*, 244 F. 2d 389 (C. A. 2d Cir.), reversed on other grounds, 355 U. S. 96. Cf. *Kendall* v. *United States*, 272 F. 2d 163,

[6] See, e. g., *Burford* v. *United States*, 214 F. 2d 124, 125 (C. A. 5th Cir.); *Ford* v. *United States*, 234 F. 2d 835, 837 (C. A. 6th Cir.); *United States* v. *Moses*, 234 F. 2d 124 (C. A. 7th Cir.); *Williams* v. *United States*, 215 F. 2d 695, 696 (C. A. 9th Cir.); *Gallegos* v. *United States*, 237 F. 2d 694, 696–697 (C. A. 10th Cir.).

165 (C. A. 5th Cir.). The Court of Appeals for the District of Columbia has been alone in squarely holding "that the *Weeks* and *Wolf* decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts." *Hanna* v. *United States*, 260 F. 2d 723, 727.

Yet this Court's awareness that the constitutional doctrine of *Wolf* operated to undermine the logical foundation of the *Weeks* admissibility rule has been manifest from the very day that *Wolf* was decided. In *Lustig* v. *United States*, 338 U. S. 74, decided that day, the prevailing opinion carefully left open the question of the continuing validity of the admissibility rule. "Where there is participation on the part of federal officers," the opinion said, "it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." 338 U. S., at 79. And in *Benanti* v. *United States*, 355 U. S. 96, the Court was at pains to point out that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court. . . ." 355 U. S., at 102, note 10. There the question has stood for 11 years.

If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.[7] It would be a curiously ambivalent rule

[7] Long before the Court established that the Fourteenth Amendment protects the security of one's privacy against arbitrary intrusion by state officers, Mr. Justice (then Judge) Cardozo perceived a basic incongruity in a rule which excludes evidence unlawfully obtained

that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution. Moreover, it would seem logically impossible to justify a policy that would bar from a federal trial what state officers had obtained in violation of a federal statute, yet would admit that which they had seized in violation of the Constitution itself. Cf. *Benanti* v. *United States*, 355 U. S. 96.

Mere logical symmetry and abstract reasoning are perhaps not enough, however, to support a doctrine that would exclude relevant evidence from the trial of a federal criminal case. It is true that there is not involved here an absolute or qualified testimonial privilege such as that accorded a spouse, a patient, or a penitent, which irrevocably bars otherwise admissible evidence because of the *status* of the witness or his relationship to the defendant. Cf. *Hawkins* v. *United States*, 358 U. S. 74. A rule which would exclude evidence if, and only if, government officials in a particular case had chosen to engage in unlawful *conduct* is of a different order. Yet, any apparent

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by federal officers, but admits in the same court evidence unlawfully obtained by state agents. "The Federal rule as it stands is either too strict or too lax. A Federal prosecutor may take no benefit from evidence collected through the trespass of a Federal officer. . . . He does not have to be so scrupulous about evidence brought to him by others. How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it and police in the service of the States on the other. The nation may keep what the servants of the States supply. . . . We must go farther or not so far. The professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . A government would be disingenuous, if in determining the use that should be made of evidence drawn from such a source, it drew a line between them. This would be true whether they had acted in concert or apart." *People* v. *Defore*, 242 N. Y. 13, 22–23.

limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice.

What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States*, 318 U. S. 332, 341. In devising such evidentiary rules, we are to be governed by "principles of the common law as they may be interpreted . . . in the light of reason and experience." Rule 26, Fed. Rules Crim. Proc. Determination of the issue before us must ultimately depend, therefore, upon evaluation of the exclusionary rule itself in the context here presented.

The exclusionary rule has for decades been the subject of ardent controversy. The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here. Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—"The criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21. The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the

man who breaks it, but to let off somebody else who broke something else." 8 Wigmore, Evidence (3d ed. 1940), § 2184.

Yet, however felicitous their phrasing, these objections hardly answer the basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. See *Eleuteri* v. *Richman*, 26 N. J. 506, 513. Mr. Justice Jackson summed it up well:

> "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> "Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar* v. *United States*, 338 U. S. 160, 181 (dissenting opinion).

Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a

negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

But pragmatic evidence of a sort is not wanting. The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.[8] Moreover, the expe-

[8] The Director of the Federal Bureau of Investigation has written as follows:

"One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

"Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action. Although the great majority in our profession have long since adopted that policy we cannot yet be entirely proud of our record. Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. . . . This state of affairs ought to be taken as a challenge to all of us. Every progressive police admin-

rience of the states is impressive. Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained.[9] Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part.[10] The movement towards the rule of exclusion has been halting but seemingly inexorable.[11] Since the *Wolf* decision one state has switched its position in that direction by legislation,[12] and two others by judicial decision.[13] Another state, uncommitted until 1955, in that year adopted the rule of exclusion.[14] Significantly, most of the exclusionary states which have had to consider the issue have held that evidence obtained by *federal* officers in a search and seizure unlawful under the Fourth Amendment must be suppressed in a prosecution in the *state* courts. *State* v. *Arregui*, 44 Idaho 43, 254 P. 788; *Walters* v. *Commonwealth*, 199 Ky. 182, 250 S. W. 839; *Little* v. *State*, 171 Miss. 818, 159 So. 103; *State* v. *Rebasti*, 306 Mo. 336, 267 S. W. 858; *State* v. *Hiteshew*, 42 Wyo. 147, 292 P. 2; see *Ramirez* v. *State*, 123 Tex. Crim. 254, 58 S. W. 2d 829. Compare *Rea* v. *United States*, 350 U. S. 214.

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istrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false." FBI Law Enforcement Bulletin, September, 1952, pp. 1–2.

[9] See Appendix.

[10] See Appendix.

[11] For a discussion of recent developments in British Commonwealth jurisdictions, see Cowen, The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions, 5 Vanderbilt L. Rev. 523 (1952). The author concludes upon a survey of Commonwealth decisions "that there is no uniform rule on the admissibility of evidence procured through illegal searches and seizures." *Id.*, at 546.

[12] North Carolina. See Appendix.

[13] Delaware and California. See Appendix.

[14] Rhode Island. See Appendix.

The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court." 44 Cal. 2d 434, at 445, 447, 282 P. 2d 905, at 911, 912, 913.

The chief law enforcement officer of California was quoted as having made this practical evaluation of the *Cahan* decision less than two years later:

> "The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice." [15]

[15] Excerpt from letter of Governor Edmund G. Brown, then Attorney General of the State of California, to the Stanford Law Review, quoted in Note, 9 Stan. L. Rev. 515, 538 (1957). See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on *People* v. *Cahan*, 43 Cal. L. Rev. 565, 586–588 (1955).

Impressive as is this experience of individual states, even more is to be said for adoption of the exclusionary rule in the particular context here presented—a context which brings into focus considerations of federalism. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way. Cf. *Wolf* v. *Colorado*, 338 U. S. 25.

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Without pausing to analyze individual decisions, it can fairly be said that in

applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement. Indeed, there are those who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee. See *Harris* v. *United States*, 331 U. S. 145, 155, 183, 195 (dissenting opinions); *United States* v. *Rabinowitz*, 339 U. S. 56, 66, 68 (dissenting opinions). In any event, while individual cases have sometimes evoked "fluctuating differences of view, . . ." *Abel* v. *United States*, 362 U. S. 217, 235, it can hardly be said that in the over-all pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary.

These, then, are the considerations of reason and experience which point to the rejection of a doctrine that would freely admit in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights. But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in *Olmstead* v. *United States*, 277 U. S. 438, at 469, 471, more than 30 years ago. "For those who agree with me," said Mr. Justice Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge." 277 U. S., at 470. (Dissenting opinion.) "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that

the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U. S., at 485. (Dissenting opinion.)

This basic principle was accepted by the Court in *McNabb* v. *United States*, 318 U. S. 332. There it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." 318 U. S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.

For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.[18] In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

The judgment of the Court of Appeals is set aside, and the case is remanded to the District Court for further proceedings consistent with this opinion.

*Vacated and remanded.*

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[18] See Rule 41 (e), Fed. Rules Crim. Proc. The defendant, of course, must have "standing" to object. See *Jones* v. *United States*, 362 U. S. 257.

## APPENDIX.

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers.*

| *State* | *Pre-Weeks* | *Pre-Wolf* | *Post-Wolf* |
|---|---|---|---|
| Alabama | Admissible | Admissible | Partially excludable |
| Arizona | ---------- | Admissible | Admissible |
| Arkansas | Admissible | Admissible | Admissible |
| California | Admissible | Admissible | Excludable |
| Colorado | ---------- | Admissible | Admissible |
| Connecticut | Admissible | Admissible | Admissible |
| Delaware | ---------- | Admissible | Excludable |
| Florida | ---------- | Excludable | Excludable |
| Georgia | Admissible | Admissible | Admissible |
| Idaho | Admissible | Excludable | Excludable |
| Illinois | Admissible | Excludable | Excludable |
| Indiana | ---------- | Excludable | Excludable |
| Iowa | Excludable | Admissible | Admissible |
| Kansas | Admissible | Admissible | Admissible |
| Kentucky | ---------- | Excludable | Excludable |
| Louisiana | ---------- | Admissible | Admissible |
| Maine | Admissible | Admissible | Admissible |
| Maryland | Admissible | Partially excludable | Partially excludable |
| Massachusetts | Admissible | Admissible | Admissible |
| Michigan | Admissible | Excludable | Partially excludable |
| Minnesota | Admissible | Admissible | Admissible |
| Mississippi | ---------- | Excludable | Excludable |
| Missouri | Admissible | Excludable | Excludable |
| Montana | Admissible | Excludable | Excludable |
| Nebraska | Admissible | Admissible | Admissible |
| Nevada | ---------- | Admissible | Admissible |
| New Hampshire | Admissible | Admissible | Admissible |
| New Jersey | ---------- | Admissible | Admissible |
| New Mexico | ---------- | Admissible | Admissible |
| New York | Admissible | Admissible | Admissible |
| North Carolina | Admissible | Admissible | Excludable |
| North Dakota | ---------- | Admissible | Admissible |
| Ohio | ---------- | Admissible | Admissible |
| Oklahoma | Admissible | Excludable | Excludable |
| Oregon | Admissible | Excludable | Excludable |
| Pennsylvania | ---------- | Admissible | Admissible |
| Rhode Island | ---------- | ---------- | Excludable |
| South Carolina | Admissible | Admissible | Admissible |
| South Dakota | Admissible | Excludable | Partially excludable |
| Tennessee | Admissible | Excludable | Excludable |
| Texas | ---------- | Excludable | Excludable |

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers.*—Continued

| *State* | *Pre-Weeks* | *Pre-Wolf* | *Post-Wolf* |
|---|---|---|---|
| Utah | ---------- | Admissible | Admissible |
| Vermont | Admissible | Admissible | Admissible |
| Virginia | ---------- | Admissible | Admissible |
| Washington | Admissible | Excludable | Excludable |
| West Virginia | Admissible | Excludable | Excludable |
| Wisconsin | ---------- | Excludable | Excludable |
| Wyoming | ---------- | Excludable | Excludable |
| | To admit—27 | To admit—29 | To admit—24 |
| | To exclude—1 | To exclude—18. | To exclude—26* |
| | Undecided—20. | Undecided—1. | Undecided—0. |

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers.*

ALABAMA

Pre-Weeks: *Shields* v. *State*, 104 Ala. 35, 16 So. 85 (admissible).
Pre-Wolf: *Banks* v. *State*, 207 Ala. 179, 93 So. 293 (admissible).
Post-Wolf: Cf. *Oldham* v. *State*, 259 Ala. 507, 67 So. 2d 55 (admissible).
(Ala. Code, 1940 (Supp. 1955), Tit. 29, § 210, requires the exclusion of illegally obtained evidence in the trial of certain alcohol control cases.)

ARIZONA

Pre-Weeks: no holding.
Pre-Wolf: *Argetakis* v. *State*, 24 Ariz. 599, 212 P. 372 (admissible).
Post-Wolf: *State* v. *Thomas*, 78 Ariz. 52, 275 P. 2d 408 (admissible).

ARKANSAS

Pre-Weeks: *Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940 (admissible).
Pre-Wolf: *Benson* v. *State*, 149 Ark. 633, 233 S. W. 758 (admissible).
Post-Wolf: *Lane, Smith and Barg* v. *State*, 217 Ark. 114, 229 S. W. 2d 43 (admissible).

CALIFORNIA

Pre-Weeks: *People* v. *Le Doux*, 155 Cal. 535, 102 P. 435 (admissible).

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*Alaska and Hawaii both hold illegally obtained evidence to be excludable although it does not appear that either has passed anew on this question since attaining statehood.

CALIFORNIA—Continued

Pre-Wolf: *People* v. *Mayen*, 188 Cal. 237, 205 P. 435 (admissible).

Post-Wolf: *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (excludable).

COLORADO

Pre-Weeks: no holding.

Pre-Wolf: *Massantonio* v. *People*, 77 Colo. 392, 236 P. 1019 (admissible).

Post-Wolf: *Williams* v. *People*, 136 Colo. 164, 315 P. 2d 189 (admissible).

CONNECTICUT

Pre-Weeks: *State* v. *Griswold*, 67 Conn. 290, 34 A. 1046 (admissible).

Pre-Wolf: *State* v. *Reynolds*, 101 Conn. 224, 125 A. 636 (admissible).

Post-Wolf: no holding.

DELAWARE

Pre-Weeks: no holding.

Pre-Wolf: *State* v. *Chuchola*, 32 Del. 133, 120 A. 212 (admissible).

Post-Wolf: *Rickards* v. *State*, 45 Del. 573, 77 A. 2d 199 (excludable).

FLORIDA

Pre-Weeks: no holding.

Pre-Wolf: *Ats* v. *Andrews*, 84 Fla. 43, 94 So. 329 (excludable).

Post-Wolf: *Byrd* v. *State*, 80 So. 2d 694 (Sub. Ct. Florida) (excludable).

GEORGIA

Pre-Weeks: *Williams* v. *State*, 100 Ga. 511, 28 S. E. 624 (admissible).

Pre-Wolf: *Jackson* v. *State*, 156 Ga. 647, 119 S. E. 525 (admissible).

Post-Wolf: *Atterberry* v. *State*, 212 Ga. 778, 95 S. E. 2d 787 (admissible).

IDAHO

Pre-Weeks: *State* v. *Bond*, 12 Idaho 424, 86 P. 43 (admissible).

Pre-Wolf: *State* v. *Arregui*, 44 Idaho 43, 254 P. 788 (excludable.)

Post-Wolf: no holding.

ILLINOIS

Pre-Weeks: *Siebert* v. *People*, 143 Ill. 571, 32 N. E. 431 (admisisble).

Pre-Wolf: *People* v. *Castree*, 311 Ill. 392, 143 N. E. 112 (excludable).

Post-Wolf: *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N. E. 2d 504 (excludable).

INDIANA

Pre-Weeks: no holding.

Pre-Wolf: *Flum* v. *State*, 193 Ind. 585, 141 N. E. 353 (excludable).

INDIANA—Continued
Post-Wolf: *Rohlfing* v. *State*, 230 Ind. 236, 102 N. E. 2d 199 (excludable).

IOWA
Pre-Weeks: *State* v. *Sheridan*, 121 Iowa 164, 96 N. W. 730 (excludable).
Pre-Wolf: *State* v. *Rowley*, 197 Iowa 977, 195 N. W. 881 (admissible).
Post-Wolf: *State* v. *Smith*, 247 Iowa 500, 73 N. W. 2d 189 (admissible).

KANSAS
Pre-Weeks: *State* v. *Miller*, 63 Kan. 62, 64 P. 1033 (admissible).
Pre-Wolf: *State* v. *Johnson*, 116 Kan. 58, 226 P. 245 (admissible).
Post-Wolf: *State* v. *Peasley*, 179 Kan. 314, 295 P. 2d 627 (admissible).

KENTUCKY
Pre-Weeks: no holding.
Pre-Wolf: *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860 (excludable).
Post-Wolf: *Johnson* v. *Commonwealth*, 296 S. W. 2d 210 (Ct. App. Kentucky) (excludable).

LOUISIANA
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Fleckinger*, 152 La. 337, 93 So. 115 (admissible).
Post-Wolf: *State* v. *Mastricovo*, 221 La. 312, 59 So. 2d 403 (admissible).

MAINE
Pre-Weeks: *State* v. *Gorham*, 65 Me. 270 (admissible) (*semble*).
Pre-Wolf: *State* v. *Schoppe*, 113 Me. 10, 92 A. 867 (admissible) (*semble*).
Post-Wolf: no holding.

MARYLAND
Pre-Weeks: *Lawrence* v. *State*, 103 Md. 17, 63 A. 96 (admissible).
Pre-Wolf: *Meisinger* v. *State*, 155 Md. 195, 141 A. 536 (admissible).
Post-Wolf: *Stevens* v. *State*, 202 Md. 117, 95 A. 2d 877 (admissible). (Flack's Md. Ann. Code, 1951, Art. 35, § 5 requires the exclusion of illegally obtained evidence in the trial of most misdemeanors.)

MASSACHUSETTS
Pre-Weeks: *Commonwealth* v. *Dana*, 2 Metc. 329 (admissible).
Pre-Wolf: *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N. E. 11 (admissible).
Post-Wolf: no holding.

MICHIGAN
Pre-Weeks: *People* v. *Aldorfer*, 164 Mich. 676, 130 N. W. 351 (admissible).

MICHIGAN—Continued

Pre-Wolf: *People* v. *Marzhausen*, 204 Mich. 559, 171 N. W. 557 (excludable).

Post-Wolf: *People* v. *Hildabridle*, 353 Mich. 562, 92 N. W. 2d 6 (excludable).

(Art. II, § 10 of the Michigan Constitution sets forth a limited class of items which are not excludable. See *People* v. *Gonzales*, 356 Mich. 247, 97 N. W. 2d 16.)

MINNESOTA

Pre-Weeks: *State* v. *Strait*, 94 Minn. 384, 102 N. W. 913 (admissible).

Pre-Wolf: *State* v. *Pluth*, 157 Minn. 145, 195 N. W. 789 (admissible).

Post-Wolf: no holding.

MISSISSIPPI

Pre-Weeks: no holding.

Pre-Wolf: *Tucker* v. *State*, 128 Miss. 211, 90 So. 845 (excludable).

Post-Wolf: *Nobles* v. *State*, 222 Miss. 827, 77 So. 2d 288 (excludable).

MISSOURI

Pre-Weeks: *State* v. *Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (admissible).

Pre-Wolf: *State* v. *Owens*, 302 Mo. 348, 259 S. W. 100 (excludable).

Post-Wolf: *State* v. *Hunt*, 280 S. W. 2d 37 (Sup. Ct. Missouri) (excludable).

MONTANA

Pre-Weeks: *State* v. *Fuller*, 34 Mont. 12, 85 P. 369 (admissible).

Pre-Wolf: *State ex rel. King* v. *District Court*, 70 Mont. 191, 224 P. 862 (excludable).

Post-Wolf: no holding.

NEBRASKA

Pre-Weeks: *Geiger* v. *State*, 6 Neb. 545 (admissible).

Pre-Wolf: *Billings* v. *State*, 109 Neb. 596, 191 N. W. 721 (admissible).

Post-Wolf: *Haswell* v. *State*, 167 Neb. 169, 92 N. W. 2d 161 (admissible).

NEVADA

Pre-Weeks: no holding.

Pre-Wolf: *State* v. *Chin Gim*, 47 Nev. 431, 224 P. 798 (admissible).

Post-Wolf: no holding.

NEW HAMPSHIRE

Pre-Weeks: *State* v. *Flynn*, 36 N. H. 64 (admissible).

Pre-Wolf: *State* v. *Agalos*, 79 N. H. 241, 107 A. 374 (admissible).

NEW HAMPSHIRE—Continued
Post-Wolf: *State* v. *Mara*, 96 N. H. 463, 78 A. 2d 922 (admissible).

NEW JERSEY
Pre-Weeks: no holding
Pre-Wolf: *State* v. *Black*, 5 N. J. Misc. 48, 135 A. 685 (admissible).
Post-Wolf: *Eleuteri* v. *Richman*, 26 N. J. 506, 141 A. 2d 46 (admissible).
(N. J. Rev. Stat. 33:1–62 provides for the return of items illegally seized in the investigation of certain alcohol control offenses.)

NEW MEXICO
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Dillon*, 34 N. M. 366, 281 P. 474 (admissible).
Post-Wolf: *Breithaupt* v. *Abram*, 58 N. M. 385, 271 P. 2d 827 (admissible).

NEW YORK
Pre-Weeks: *People* v. *Adams*, 176 N. Y. 351, 68 N. E. 636 (admissible).
Pre-Wolf: *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (admissible).
Post-Wolf: *People* v. *Variano*, 5 N. Y. 2d 391, 157 N. E. 2d 857 (admissible).

NORTH CAROLINA
Pre-Weeks: *State* v. *Wallace*, 162 N. C. 622, 78 S. E. 1 (admissible).
Pre-Wolf: *State* v. *Simmons*, 183 N. C. 684, 110 S. E. 591 (admissible).
Post-Wolf: *State* v. *Mills*, 246 N. C. 237, 98 S. E. 2d 329 (excludable).
(N. C. Gen. Stat. § 15–27 requires the exclusion of illegally obtained evidence.)

NORTH DAKOTA
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Fahn*, 53 N. D. 203, 205 N. W. 67 (admissible).
Post-Wolf: no holding.

OHIO
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. 2d 490 (admissible).
Post-Wolf: *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (admissible).

OKLAHOMA
Pre-Weeks: *Silva* v. *State*, 6 Okla. Cr. 97, 116 P. 199 (admissible).
Pre-Wolf: *Gore* v. *State*, 24 Okla. Cr. 394, 218 P. 545 (excludable).

OKLAHOMA—Continued

Post-Wolf: *Hamel* v. *State*, 317 P. 2d 285 (Okla. Crim.) (excludable).

OREGON

Pre-Weeks: *State* v. *McDaniel*, 39 Ore. 161, 65 P. 520 (admissible).

Pre-Wolf: See *State* v. *Laundy*, 103 Ore. 443, 204 P. 958 (excludable), although see *State* v. *Folkes*, 174 Ore. 568, 150 P. 2d 17 (not noticing *State* v. *Laundy*).)

Post-Wolf: *State* v. *Hoover*, 69 Ore. Adv. Sh. 715, — Ore. —, 347 P. 2d 69 (questioning *Laundy*).

PENNSYLVANIA

Pre-Weeks: no holding.

Pre-Wolf: *Commonwealth* v. *Dabbierio*, 290 Pa. 174, 138 A. 679 (admissible).

Post-Wolf: *Commonwealth* v. *Chaitt*, 380 Pa. 532, 112 A. 2d 379 (admissible).

RHODE ISLAND

Pre-Weeks: no holding.

Pre-Wolf: no holding.

Post-Wolf: *State* v. *Hillman*, 84 R. I. 396, 125 A. 2d 94 (applying common law rule, but noticing the enactment of the statutory rule).

(R. I. Gen. Laws, 1956, § 9–19–25 requires the exclusion of illegally obtained evidence.)

SOUTH CAROLINA

Pre-Weeks: *State* v. *Atkinson*, 40 S. C. 363, 18 S. E. 1021 (admissible).

Pre-Wolf: *State* v. *Green*, 121 S. C. 230, 114 S. E. 317 (admissible).

Post-Wolf: *State* v. *Anderson*, 230 S. C. 191, 95 S. E. 2d 164 (admissible).

SOUTH DAKOTA

Pre-Weeks: *State* v. *Madison*, 23 S. D. 584, 122 N. W. 647 (admissible).

Pre-Wolf: *State* v. *Gooder*, 57 S. D. 619, 234 N. W. 610 (excludable).

Post-Wolf: *State* v. *Poppenga*, 76 S. D. 592, 83 N. W. 2d 587 (excludable).

S. D. Code, 1939, § 34.1102 provides for a limited return to the common-law rule of admissibility. See *State* v. *Lane*, 76 S. D. 544, 82 N. W. 2d. 286.

TENNESSEE

Pre-Weeks: *Cohn* v. *State*, 120 Tenn. 61, 109 S. W. 1149 (admissible).

Pre-Wolf: *Hughes* v. *State*, 145 Tenn. 544, 238 S. W. 588 (excludable).

Post-Wolf: *Lindsey* v. *State*, 191 Tenn. 51, 231 S. W. 2d 366 (excludable).

TEXAS
Pre-Weeks: no holding.
Post-Wolf: *Chaplin* v. *State*, 107 Tex. Crim. 477, 296 S. W. 1095 (excludable).
Post-Wolf: *Williamson* v. *State*, 156 Tex. Crim. 520, 244 S. W. 2d 202 (excludable).
(Vernon's Tex. Stat., 1948 (Code Crim. Proc.,) requires the exclusion of illegally obtained evidence.)

UTAH
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Aime*, 62 Utah 476, 220 P. 704 (admissible).
Post-Wolf: no holding.

VERMONT
Pre-Weeks: *State* v. *Mathers*, 64 Vt. 101, 23 A. 590 (admissible).
Pre-Wolf: *State* v. *Stacy*, 104 Vt. 379, 160 A. 257 (admissible).
Post-Wolf: *In re Raymo*, 121 Vt. 426, 154 A. 2d 487 (admissible).

VIRGINIA
Pre-Weeks: no holding.
Pre-Wolf: *Hall* v. *Commonwealth*, 138 Va. 727, 121 S. E. 154 (admissible).
Post-Wolf: no holding.

WASHINGTON
Pre-Weeks: *State* v. *Royce*, 38 Wash. 111, 80 P. 268 (admissible).
Pre-Wolf: *State* v. *Gibbons*, 118 Wash. 171, 203 P. 390 (excludable).
Post-Wolf: *State* v. *Cyr*, 40 Wash. 2d 840, 246 P. 2d 480 (excludable).

WEST VIRGINIA
Pre-Weeks: *State* v. *Edwards*, 51 W. Va. 220, 41 S. E. 429 (admissible).
Pre-Wolf: *State* v. *Wills*, 91 W. Va. 659, 114 S. E. 261 (excludable).
Post-Wolf: *State* v. *Calandros*, 140 W. Va. 720, 86 S. E. 2d 242 (excludable).

WISCONSIN
Pre-Weeks: no holding.
Pre-Wolf: *Hoyer* v. *State*, 180 Wis. 407, 193 N. W. 89 (excludable).
Post-Wolf: *State* v. *Kroening*, 274 Wis. 266, 79 N. W. 2d 810 (excludable).

WYOMING
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *George*, 32 Wyo. 223, 231 P. 683 (excludable).
Post-Wolf: no holding.